

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In in the Matter of the Appeal of:

**SHIMMICK-NICHOLSON CONSTRUCTION,
A JOINT VENTURE
8201 Edgewater Drive, Suite 202
Oakland, CA 94621**

Employer

**DOCKETS 15-R1D1-1732
and 1733**

DECISION

Statement of the Case

Shimmick-Nicholson Construction, a Joint Venture¹ (“Employer”) is a general engineering and building contractor, licensed by the State of California, with additional certifications in electrical and fencing.

Beginning January 30, 2015, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Channing Sheets and Regional Manager Michael Frye, conducted an accident inspection at 415 Mission Street, San Francisco, California (the site). On May 1, 2015, the Division cited Employer for three violations of California Code of Regulations, title 8:² failing to inform all of its employees in its emergency procedures;³ failing to identify the hazard posed by the subject static cable line and provide training in its use;⁴ and failing to remove the static line which presented an encumbrance hazard.⁵

Employer filed a timely appeal contesting the existence of the violation of the safety order in all the citations. Further, as to Citation 2, Item 1, Employer contested its classification and the reasonableness of the proposed penalty.

¹ Employer, named herein as “Shimmick-Nicholson, A Joint Venture” is referred to herein as “Employer” or “the Joint Venture”.

² Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

³ As required by section 1512, subdivision (d).

⁴ As required by section 1509, subdivision (a).

⁵ As required by section 1541, subdivision (a).

Employer also argued that the citations were issued to the wrong employer.

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (OSHAB), at Oakland, California on April 6, 2016. Robert Peterson, Esq., of the Robert D. Peterson Law Corporation, represented Employer. Michael Frye, Regional Manager, represented the Division. The parties were granted leave to file post-hearing briefs by May 5, 2016. The matter was submitted for decision on May 5, 2016. Both parties filed timely post-hearing briefs. On his own motion, ALJ Elmendorf extended the submission date to September 1, 2016.

Issues

1. Were the citations issued to the proper Employer?
2. Did Employer fail to inform all of its employees as to Employer's emergency procedures?
3. Did Employer fail to identify the hazard posed by the static line and fail to provide training to safely complete the work assignment in the presence of the hazard?
4. Did the static line constitute a surface encumbrance hazard that should have been removed prior to sending an employee into the area where the excavator was working in close proximity to the static line?
5. Did the Division establish a rebuttable presumption that Citation 2, Item 1 is properly classified as a serious violation?
6. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
7. Did the Division establish that the penalties for each of the citations were reasonable?

Findings of Fact

1. The correct employer was cited for the alleged violations.
2. On January 12, 2015, Brandon Jordan (Jordan), a laborer employed by Shimmick Nicholson Construction, a Joint Venture, (SNJV) suffered serious physical harm when an excavator caught a

static cable line which snapped and then struck Jordan's hand against a wall, resulting in the amputation of Jordan's index finger.

3. At the time of the accident, the workers' assigned project was to remove soil and debris that had fallen from one side of a wall between adjacent job sites. An excavator was being used to reach through a gap in the wall to scrape the area clear and Jordan's job was to shovel loose debris into the excavator bucket.

4. Before the start of work, Employer's Superintendent Antone Ivovic (Ivovic) pointed out the cable static line to the workers, but he failed to identify it as a hazard and failed to remove it.

5. After pointing out the cable static line, Employer's Superintendent did not provide any training to Jordan or the excavator operator as to how to safely complete the assigned project with the cable static line remaining in the work area.

6. The static cable line constituted a surface encumbrance hazard that should have been removed prior to sending an employee into the area where the excavator was working in close proximity to the static line.

7. After the accident, Jordan went to Employer's on-site office to seek medical attention for his injured hand. Upon his arrival, Ivovic immediately began to assess the injury while sending another employee for the first aid kit and to obtain information as to the location of the local clinic. Ivovic then called 911 and discovered Jordan was also on the 911 line at the same time.

8. The penalties for each of the citations were calculated in accordance with Cal/OSHA's policies and procedures.⁶

Analysis

1. Were the citations issued to the proper Employer?

In its closing brief, Employer argues that no evidence was presented that the worker (Jordan) was an employee of the Joint Venture or that any of the Joint Venture employees were responsible for the accident.

In his uncontroverted testimony, Jordan reported that he was an employee of "Shimmick-Nicholson" as did Employer's Superintendent, Antone

⁶ The parties stipulated that the penalties were calculated in accordance with Cal/OSHA's policies and procedures.

Ivovic. Employer presented no evidence to refute this testimony or to establish that the wrong Employer was cited.⁷ Employer argues this point for the first time in its closing brief, other than this assertion being included in the 20+ item list of “Affirmative Defenses” filed with Employer’s appeal. Accordingly, it is found that the Division has met its burden of proof that the correct employer was cited for the alleged violations.

2. Did Employer fail to inform all of its employees as to Employer’s emergency procedures?

Section 1512, subdivision (d) under “Emergency Medical Services, Informing Employees of Emergency Procedures,” in relevant part, provides the following:

Each employer shall inform all of its employees of the procedures to follow in case of injury or illness.

In the citation, the Division alleges the following:

Prior to the course of inspection including, but not limited to January 30, 2015, the Employer failed to inform all their employees in their emergency procedures. On or about January 12, 2015, an injured employee had to contact emergency services because his co-workers were not familiar with the emergency procedures.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the

⁷ Except as otherwise noted in this Decision, Employer failed to present evidence in support of its pleaded affirmative defenses, and said defenses are therefore deemed waived. (See, e.g. *Central Coast Pipeline Construction Co., Inc*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980) [holding that the employer bears the burden of proving all of the elements of the Independent Employee Action Defense].)

regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013) (Internal citations omitted).)

To establish this violation, the division must establish that employees at the work site were not properly informed as to emergency procedures to follow in the case of injury or illness.

The evidence on this point is limited to the testimony of Jordan and Iovic with regard to what occurred following the accident. It is undisputed that Jordan went directly to the office trailer after the accident. Jordan's testimony is vague as to what occurred at the trailer. Jordan asserts that no one in the office trailer knew what to do when he arrived in the office trailer, but he does not describe in any detail how many employees were in the office or their job functions. Moreover, he does not describe their actions or words upon seeing he was injured. Almost immediately upon his arrival at the trailer, Jordan called 911.

Iovic credibly testified in detail that he immediately met with Jordan upon Jordan's arrival at the office and he began taking steps to assess Jordan's injuries, retrieve the first aid kit and obtain emergency services by calling 911. Iovic further testified that when he called 911, Jordan was simultaneously talking to the 911 operator.

There was little or no delay in obtaining emergency care for Jordan and there is no evidence, other than Jordan's vague testimony, that the employees in the trailer were uninformed as to emergency medical procedures.

Iovic's testimony is credited and it is found that Employer's employee (Iovic) was properly trained in emergency procedures.⁸ There is insufficient evidence to establish that Employer failed to inform all its employees of the procedures to follow in case of injury or illness. As such, it is found that the Division has not established by a preponderance of the evidence that Employer violated Section 1512, subdivision (d). Therefore, Employer's appeal of Citation 1, Item 1 is granted and Citation 1, Item 1 is vacated.

3. Did Employer fail to identify the hazard posed by the static line and fail to provide training to safely complete the work assignment in the presence of the hazard?

In Citation 1, Item 2, the Division cited Employer for a violation of Section 1509, subdivision (a) under "Injury and Illness Prevention Program," which in relevant part, provides the following:

⁸ Iovic reported that a young engineer in the trailer was shaken up by the emergency and had difficulty locating the first aid kit that was hanging on the wall. This did not establish that he was improperly trained, merely that he was excited by the events.

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

Section 3203, subdivision (a), requires employers to establish, implement, and maintain an effective IIPP. Among other things, employers must effectively include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.

Citation 1, Item 2, further references section 3203, subdivision (a)(4) which requires that the IIPP “Includes procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.” Also referenced is section 3203, subdivision (a)(7) which requires that the IIPP shall, at a minimum, “Provide training and instruction.”

The alleged violation description is as follows:

Prior to and during the course of inspection including, but not limited to January 30, 2015 the Employer failed to identify the hazard posed by the static line and provide training in its use.

To prove the above violation, the Division must establish that Employer’s IIPP was either inadequately drafted and/or implemented such that Employer failed to properly identify the hazard posed by the static line. Further, it must be established that the Employer failed to provide proper training with regard to safely completing the work assignment with the surface encumbrance remaining in the work area.

Employer’s Superintendent Iovic testified that he met with Powe, the operator of the excavator, and Jordan, the laborer, prior to commencing the work on the assignment and in that meeting, the static line’s presence in the work area was discussed. Further, according to Jordan’s unrefuted testimony, Iovic did not provide any training as to how Jordan and Powe could reduce or eliminate the hazards associated with the static line while completing the assigned task. It is undisputed that the accident occurred when the excavator reached through the gap in the wall and as the excavator bucket was withdrawing from the hole, it snagged the static cable line. The cable line then snapped and slammed Jordan’s hand against the wall, crushing his hand.

As shown, the Division met its burden of establishing that Employer’s

IIPP was either improperly drafted or implemented such that the Employer failed to properly identify the hazard posed by the static line and failed to provide proper training with regard to completing the work assignment with the surface encumbrance remaining in the work area. Accordingly, it is found that Employer violated section 1509, subdivision (a) and Employer's appeal is denied.

4. Did the static line constitute a surface encumbrance hazard that should have been removed prior to sending an employee into the area where the excavator was working in close proximity to the static line?

Section 1541, subdivision (a), under "Excavations, General Requirements, Surface encumbrances" in relevant part, provides the following:

Surface encumbrances. All surface encumbrances that are located so as to create a hazard to employees shall be removed or supported, as necessary, to safeguard employees.

In the citation, the Division alleges the following:

Prior to and during the course of inspection including, but not limited to January 30, 2015, the Employer failed to remove the static line which represented an encumbrance hazard. The Employee's hand was seriously injured when the excavator came in contact with the static line causing it to be pulled against the wall. As a result, the Employee's hand was pinched between the static line and the wall.

In order to prove a violation, the Division has the burden of establishing that Section 1541, subdivision (a), is applicable to the circumstances of the alleged violation and that 1) there was a surface encumbrance, 2) located so as to create a hazard to employees working in an excavation; and, 3) that was not removed or supported, as necessary, to safeguard employees.

Ivovic's testimony and the photos of the work site⁹ established that the subject work area was within an excavation and that the static line was above grade, such that it constituted a surface encumbrance.¹⁰ Further, Ivovic admitted that the static line was a surface encumbrance and that he did generally discuss the cable line with the operator and the injured worker prior to commencement of the work. However, he did not specify the hazard that the excavator might snag the cable and slap it into the wall, crushing or severing

⁹ See photos, Division's Exhibits 7, 8 & 9.

¹⁰ In that the site of the accident was in an "excavation" area, section 1541, subdivision (a) is applicable to the circumstances as alleged in the subject citation.

Jordan's body parts caught between the cable and the wall. Moreover, he took no additional steps to prevent the hazard from causing an injury. Iovic admits that the Employer did not remove the static line or pull it out of the work area while the work was being performed.

The weight of the evidence establishes that the Employer recognized the presence of the static cable line, but did not identify it as a hazard to employees working in the excavation, which it was. Ultimately, Employer did not remove or support, as necessary, the static cable line to safeguard employees. Accordingly, it is found that the Employer violated Section 1541, subdivision (a).

5. Did the Division establish a rebuttable presumption that Citation 2, Item 1 is properly classified as a serious violation?

Labor Code § 6432, subdivision (a) states:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm¹¹ could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: ...

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Here, Jordan suffered a partial amputation of his left index finger when the cable static line snapped against his hand that was pressed against the wall. In that Jordan suffered the amputation of his index finger and the attendant disfigurement, Jordan's injuries constitute "serious physical harm"

¹¹ Labor Code section 6432, subdivision (e) provides as follows:

"Serious physical harm" as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

pursuant to Labor Code section 6432. In that Jordan suffered serious physical harm from the actual hazard of leaving the static line in the work area while using the excavator in close proximity, it is established that a realistic possibility of serious physical harm exists as a result of the actual hazard. Accordingly, the violation is within the definition of a “serious violation” as set forth in Labor Code section 6432. The Division established a rebuttable presumption that the violation was properly classified as a serious violation.

6. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Labor Code section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A. A. Portonova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

Employer did not present evidence that it was unaware of the violation. To the contrary, Employer’s Superintendent Ivovic testified that he recognized the existence of the static cable line as a surface encumbrance and that he pointed out the static cable line to the workers, but he took no action to remove the cable line or otherwise reduce its risks. It is clear that the employer had knowledge of the cable line prior to the accident and should have recognized it as a potential hazard.

Employer failed to present evidence which rebuts the presumption of a serious classification. The classification of Citation 2, Item 1 as serious is accepted.

7. Did the Division establish that the penalties for Citation 2, Item 1 were reasonable?

Penalties calculated in accordance with the penalty setting regulations (sections 333-336) are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

At the commencement of the hearing, the parties stipulated that the penalties for the citations were computed in accordance with the Division's policies and procedures and that it would not be necessary to take evidence on or review the Division's Form C10. As such, Division has met its burden to show that the penalties were calculated correctly.

Therefore, the proposed penalties of \$450 for Citation 1, Item 2; and \$9,000 for Citation 2, Item 1 are each found reasonable.

Conclusions

The evidence supports a finding that Employer did not violate section 1512, subdivision (d) by failing to inform all of its employees of the procedures to follow in case of illness or injury.

The evidence supports a finding that the violation of Section 1509, subdivision (a), is established in that Employer's IIPP was inadequately drafted or implemented such that Employer failed to identify hazards in the workplace and to provide training as to such hazards.

The evidence supports a finding that the violation of Section 1541, subdivision (a), is established in that the subject surface encumbrance was not removed or otherwise supported, as necessary, to protect employees.

Citation 2, Item 1 is properly classified as serious.

The assessed penalties are reasonable and correctly calculated.

ORDER

Citation 1, Item 1, and the penalty of \$450, is dismissed.

Citation 1, Item 2, and the penalty of \$450, is affirmed.

Citation 2, Item 1, and the penalty of \$9,000 is affirmed.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: September 26, 2016

KE:mfr

J. KEVIN ELMENDORF
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

NOTE: If you disagree with this order, you may petition the Appeals Board for reconsideration within 30 days. The petition must comply with the requirements of Labor Code §§6614 through 6619. Please call the Appeals Board at (916) 274-5751 if you need assistance.

SUMMARY TABLE ORDER

In the Matter of the Appeal of:

**SHIMMICK-NICHOLSON CONSTRUCTION, A JOINT VENTURE
DOCKETS 15-R1D1-1732 - 1733**

Abbreviation Key:	
G=General	Reg=Regulatory
S=Serious	W=Willful
Er=Employer	R=Repeat
Ee=Employee	DOSH=Division

Inspection No. 1021893

Site: 415 Mission Street, San Francisco, CA 94105
Date of Inspection: 01/30/15 - 01/30/15

Date of Citation: 05/01/15

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
15-R1D1-1732	1	1	1512(d)	G	[DOSH alleged that Employer failed to inform its workers of emergency procedures.] ALJ grants appeal. Citation dismissed.		X	\$450	\$450	\$0
		2	1509(a)	G	[Employer failed to establish or implement its IIPP such that surface encumbrance hazards are identified and Employees are trained to avoid injury.] Citation and penalty affirmed.	X		\$450	\$450	\$450
15-R1D1-1733	2	1	1541(a)	S	[Employer failed to remove a static cable line that constituted a surface encumbrance hazard.] Citation and penalty affirmed.	X		\$9,000	\$9,000	\$9,000
Sub-Total								\$9,900	\$9,900	\$9,450

Total Amount Due*

\$ 9,450

Please do not send payments to the Appeals Board.
All Penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ:JKE
POS: 09/___/16**

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833.

On September ____, 2016, I served the attached **DECISION** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Robert D. Peterson, Attorney
ROBERT D. PETERSON LAW CORP.
3300 Sunset Boulevard, Suite 110
Rocklin, CA 95677

SAN FRANCISCO DISTRICT OFFICE
ATTN: Michael Frye, Regional Manager
455 Golden Gate Avenue, Suite 9516
San Francisco, CA 94102

DOSH LEGAL UNIT
ATTN: Amy Martin, Chief Counsel
1515 Clay Street, Suite 1901
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September ____, 2016, at Sacramento, California.

Declarant

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

SHIMMICK-NICHOLSON CONSTRUCTION, A JOINT VENTURE

DOCKET 15-R1D1-1732 through 1733

Date of Hearing: April 6, 2016

Exhibit Description

<u>Exhibit No.</u>	<u>Division's Exhibits</u>	<u>Status</u>
1	Jurisdictional Documents	
2	Accident Report (8:01 pm)	
3	Accident Report (8:30 pm)	
4	Business Cards – Meeting	
5A	Field Documentation Worksheets - 2 pages	
5B	Field Documentation Worksheets – 10 pages	
6	Injured Worker (Brandon Jordan) Interview	
7	Photo of Northside of Wall- accident area	
8	Photo of Southside of Wall- accident area	
9	Photo - South Side of Wall – Employer photo	
10	Excavator – Komatsu	
11	Investigator Frye's Notes 11 pages	
12	State Contractor's Licensing Board report	

Employer's Exhibits

A	Documentation Worksheet re Citation 1:1
B	Documentation Worksheet re Citation 1:2
C	Documentation Worksheet re Citation 2:1

Witnesses Testifying at Hearing

Channing Sheets
Brandon Jordan
Michael Frye
Antone Ivovic

CERTIFICATION OF RECORDING

*I, **J. Kevin Elmendorf**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

Signature

Date